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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SECURITY PACIFIC NATIONAL BANK,
Petitioner,

v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

At one time, national banks were prohibited from providing basic banking services through branch offices, even though many state banks were allowed to engage in such branching. To correct this competitive imbalance, the McFadden Act was enacted in 1927. Under the Act, a national bank may establish "branches," defined "to include any . . . office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent," but only in the bank's home state and only to the extent allowed by that state's laws governing the number and location of bank branches. 12 U.S.C. § 36(c), (f). In a decision which conflicts with the law of several other Circuits, a divided court of appeals below held that national bank facilities (in this case, discount brokerage offices) admittedly not performing basic banking functions even resembling those enumerated in the Act's "branch" definition nevertheless are "branches" subject to the Act's branching restrictions and that a non-bank entity has standing to seek enforcement of those restrictions. Thus, the questions presented are:

(1) Does every national bank facility conducting federally-authorized activities, no matter how peripheral they may be to the basic business of banking, constitute a "branch" subject to the McFadden Act's branching restrictions?

(2) Does an association with no cognizable connection with national or state banks fall within the group of persons the McFadden Act was intended to protect and therefore meet the "zone-of-interests" standing prerequisite for seeking enforcement of the Act?

PARTIES TO THE PROCEEDINGS

Petitioner is Security Pacific National Bank, an intervenor below. Respondent is the Securities Industry Association, a trade association of non-bank securities brokers, dealers, and underwriters. Defendants below were C.T. Conover, Comptroller of the Currency of the United States,* and the Office of the Comptroller of the Currency.**

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* Robert L. Clarke now serves as Comptroller of the Currency.

** As required by Rule 28.1 of this Court, petitioner states that its parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates consist of Security Pacific Corporation, Century Credit Corporation, Hoare Govett Ltd., Security Pacific Bank S.A., Tricontinental Holdings Ltd., Marac Holdings Ltd., Guaranty Trust Ltd., Caixa Leasing S.A., Security Pacific Leasing S.A., TMG Investment Pte. Ltd., Pan Pacific Ventures, Inc., SECPRO S.A., SPAL Management Ltd., Atlantic Century Advisors, Inc., Munder Capital Management, Inc. and Hong Kong & Shanghai Insurance Co., Ltd.

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SECURITY PACIFIC NATIONAL BANK,
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v.

SECURITIES INDUSTRY ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Security Pacific National Bank respectfully requests that this Court issue a writ of certiorari to review those portions of the decision of the United States Court of Appeals for the District of Columbia Circuit (entered in this proceeding on April 12, 1985) which affirmed the district court's holdings concerning the branching provisions of the McFadden Act and the standing of respondent Securities Industry Association to seek enforcement of those provisions.

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the District of Columbia Circuit and an opinion dissenting therefrom are reported at 758 F.2d 739 (D.C. Cir. 1985), and are reprinted as Appendix

("App.") A (1a).[1] The District Court's decision is reported at 577 F. Supp. 252 (D.D.C. 1983), and is reprinted as App. B (4a). The decision of the Comptroller of the Currency approving Security Pacific National Bank's application to establish a discount brokerage subsidiary is reported at [1982-83 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 99,284 (1982), and is reprinted as App. C (22a). The court of appeals order denying the suggestions for rehearing *en banc*, along with the dissenting opinion of three judges, is reported at 765 F.2d 1196 (D.C. Cir. 1985), and is reprinted as App. E (38a).

JURISDICTION

The opinion of the United States Court of Appeals for the District of Columbia Circuit was entered on April 12, 1985. Petitioner's suggestion for rehearing *en banc* was denied on July 12, 1985. On October 1, 1985, the Chief Justice entered an order extending petitioner's time for filing a petition for writ of certiorari to November 9, 1985. On November 6, 1985, the Chief Justice signed an order further extending petitioner's time for filing to December 9, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 2, Clause 1 (embodying the case or controversies requirement).

Sections 7(c) and 7(f) of the National Bank Act Amendments of 1927 (the "McFadden Act"), as amended, 44 Stat. 1224, 1228-29 (codified at 12 U.S.C. § 36(c), (f).)

The constitutional and statutory provisions involved are reprinted in App. G.

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[1] Citations to material printed in the attached Appendix appear as "——a".

STATEMENT

This case presents important questions of banking and administrative law concerning (a) the applicability of the McFadden Act's restrictions on the location of national bank "branches" and (b) the showing that an injured party must make in order to enforce those restrictions. The district court's rulings on these questions, which were affirmed by the District of Columbia Circuit, constitute a substantial departure from longstanding rulings of the Comptroller, conflict with the decisions of other Circuits, and therefore warrant examination by this Court.

A. The Comptroller's Approval of Security Pacific's Application.

On July 2, 1982, petitioner Security Pacific National Bank ("Security Pacific") filed an application with the Comptroller to establish a wholly-owned operating subsidiary ("Discount Brokerage") that would broker securities at rates much lower than full-service competitors. Security Pacific proposed to offer such services not only at its branch banks in its home state of California but also at non-branch locations both inside and outside that state.

On August 26, 1982, the Comptroller issued a decision approving Security Pacific's application. (App. C, 22a). After concluding that the Glass-Steagall Act, particularly 12 U.S.C. § 24 (Seventh), provided "clear authorization for banks and . . . their operating subsidiaries . . . to engage in the activities contemplated for Discount Brokerage" (*id.* at 23a), the Comptroller examined whether Discount Brokerage offices would constitute "branches" that under the McFadden Act, could be established only within Security Pacific's home state and only to the extent allowed by state law restrictions on the number and location of branches. (*Id.* at 29a-35a). Noting that the Act defines "branch" as a facility at which "deposits

are received, or checks are paid, or money lent," *see* 12 U.S.C. § 36(f), the Comptroller, concluding that the Discount Brokerage offices would not perform any of these functions, determined that "the activities of Discount Brokerage, viewed individually or collectively, . . . [did] not . . . constitute branch banking for purposes of the McFadden Act." (*Id.* at 35a).

Relying on the Comptroller's approval, Discount Brokerage has established twenty offices (including eighteen in nine states outside California) and presently maintains approximately 245,000 customer accounts (about 155,000 of which are held by persons residing outside California). Approximately sixty other national banks have applied to create or acquire similar discount brokerage subsidiaries.[2]

B. District Court Proceedings.

On October 6, 1982, the Securities Industry Association ("SIA"), a trade association of non-bank securities firms competing with Discount Brokerage, filed this action challenging the Comptroller's approval of the Security Pacific application.[3] SIA, whose suit was neither joined nor formally supported by any state bank, urged reversal of the Comptroller's action arguing (1) that the Glass-Steagall Act prohibited national bank subsidiaries from offering discount brokerage services and (2) that the McFadden Act prohibited Security Pacific from offering brokerage services at any location away from its main office and branches, all of which must be in California.

On cross-motions for summary judgment, the United States District Court for the District of Columbia re-

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[2] For example, on September 20, 1982, the Comptroller approved the application of Union Planters National Bank of Memphis ("Union Planters") to acquire an existing discount brokerage firm. (*See* App. D.)

[3] SIA also challenged the Comptroller's approval of the Union Planters application. *See supra* note 2.

jected SIA's Glass-Steagall Act arguments. 577 F. Supp. at 254-57 (8a-14a). However, the court found SIA's McFadden Act challenge to be meritorious. *Id.* at 257-60 (14a-21a). The court first held that SIA had standing to seek enforcement of the Act's branching provisions. *Id.* at 258-59 (15a-17a). Then, concluding that any national bank facility performing a function which "national banks may conduct at their main office" is a "branch" under the Act, *id.* at 260 (20a), and finding that brokerage activities could physically be carried on at a bank's main office, the court ruled the Comptroller's approval invalid to the extent that it authorized establishment of brokerage offices at any location outside California and at "unchartered locations" (*i.e.*, non-branch locations) in California. (App. F, 44a).

C. Court of Appeals Proceedings.

The parties cross-appealed to the United States Court of Appeals for the District of Columbia Circuit, but briefing was deferred because the Glass-Steagall Act issue closely resembled a question then pending before this Court in *Securities Industry Association v. Board of Governors*, 104 S. Ct. 3003 (1984) ("*Schwab*") (bank holding company affiliates are authorized by the Glass-Steagall Act to provide discount brokerage services).[4] After *Schwab* was decided, the court of appeals issued a two-sentence *per curiam* opinion affirming the district court's conclusions "generally for the reasons stated in its Memorandum Opinion." 758 F.2d at 740 (2a). The panel unanimously affirmed the district court's Glass-Steagall Act analysis, noting that it "receive[d] substantial support" from *Schwab*,[5] *id.*, but the panel split on

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[4] Because *Schwab* concerned bank holding companies which, unlike national banks, are not subject to McFadden Act restrictions, this Court did not consider the issues presented by this petition.

[5] SIA has petitioned for a writ of certiorari as to the Glass-Steagall Act issue notwithstanding its close similarity to the question considered in *Schwab* only last Term. *Securities Industry*

the McFadden Act issue. The majority affirmed without comment, but Judge Scalia dissented, concluding that SIA lacked standing because only "state banks and possibly federal banks . . . are within the zone of interests protected by the [Act's] branch banking restrictions." *Id.* (3a).

Security Pacific subsequently intervened and joined the Comptroller in seeking rehearing of the McFadden Act issue. On July 12, 1985, the court of appeals, voting 5-3, denied the suggestions for rehearing *en banc.* 765 F.2d at 1196 (App. E, 38a-39a). Judges Scalia, Bork and Starr, however, issued a vigorous dissent, stating that the majority's McFadden Act conclusion was "mistaken" and that its standing analysis improperly "discard[ed] the zone [of interests] test entirely." *Id.* at 1197 (41a). The dissenters urged further review, noting that "this case squarely presents important questions" in both "banking . . . and administrative law." *Id.* at 1198 (42a).[6]

REASONS FOR GRANTING THE WRIT

Enacted almost sixty years ago to give national banks "competitive equality" with state banks, the McFadden Act allows every national bank to operate "branches" away from its main office. However, the Act limits such "branches" to the bank's home state and makes them

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Ass'n v. Comptroller of the Currency, petition for cert. filed, 54 U.S.L.W. 3170 (U.S. Sept. 9, 1985) (No. 85-392). Particularly when contrasted with the questions presented by the instant petition, the Glass-Steagall Act question plainly does not warrant review. There was unanimity on the question among the judges below, and SIA cites no split of authority.

[6] Discount Brokerage has continued to operate both inside and outside of California pursuant to a stay issued by the district court. On July 25, 1985, SIA moved the court of appeals for an injunction that would have shut Discount Brokerage's eighteen offices outside of California, disrupting service of thousands of out-of-state accounts. On August 2, 1985, however, the court denied SIA's motion. It has since continued to stay issuance of the mandate pending the filing of this petition.

subject to the same state law restrictions on the number and location of "branches" applicable to state banks of the jurisdiction. Historically, only those national bank facilities actually engaged in basic banking functions of the type enumerated in section 36(f) of the Act (*i.e.*, receiving deposits, paying checks, loaning money) have been deemed to be "branches," and therefore, in accordance with the Comptroller's long and consistent practice, the Act generally has not been viewed as restricting facilities engaged only in peripheral national bank activities. Thus, with the Comptroller's imprimatur, national banks for many years have provided important peripheral services through facilities dispersed nationwide and without regard to home state limitations on the number and location of branches.

In this case, however, a non-bank entity using the McFadden Act to eliminate competition from national banks has persuaded a bare majority of the District of Columbia Circuit to break with this longstanding tradition and to conclude that under the Act, discount securities brokerage, clearly not a basic banking function, is nevertheless subject to the McFadden Act's branching restrictions. If not reversed, the decision will, at a minimum, require every national bank (including Security Pacific) to dismantle or reorganize existing brokerage operations and deny each such bank nationwide participation in the discount brokerage market. But the decision has far more pervasive implications because it effectively rejects the view of what constitutes a McFadden Act "branch" suggested by this Court and previously embraced by the Second and Tenth Circuits. Instead, the District of Columbia Circuit joined the Eighth Circuit in endorsing a test that would render any function performed by a national bank subject to the Act's constraints on "branches", thus calling into question the substantial volume of various important peripheral banking activities historically carried on by national banks at their non-branch locations inside and outside their home states.

The impact of this unfortunate policy shift is magnified because the District of Columbia Circuit also sustained the district court's holding that a non-bank has standing to seek enforcement of the McFadden Act's branching restrictions notwithstanding the Act's clear purpose of protecting only a very narrow "zone of interests" (*i.e.*, state—and perhaps federal—banks). Thus, the cumulative effect of the decision below will be to give parties the Act was never intended to protect free rein to seek elimination of competition from national bank activities the McFadden Act was not intended to affect.

Because the Comptroller is bound by the law of the District of Columbia Circuit and therefore presumably will not again authorize a national bank discount brokerage subsidiary, future opportunities to review the specific issues presented by this petition will not arise. Further, the basic conflict among the Circuits over the proper interpretation of the McFadden Act's "branch" definition is unlikely to be sharpened by future decisions of other Circuits because entities seeking to hamstring national bank activities will henceforth proceed in the District of Columbia Circuit, where the law is now most favorable. Petitioner Security Pacific therefore respectfully submits that the issues it presents should be reviewed at this time not only to correct the lower court errors in this case, but also to resolve a continuing conflict of law among the Circuits and to ensure that national bank activities are not restricted by means outside the congressionally-mandated regulatory process.

I. THE LOWER COURTS' ERRONEOUS McFADDEN ACT INTERPRETATION FURTHERS A SPLIT OF THE CIRCUITS ON AN IMPORTANT BANKING LAW ISSUE AND PLACES A CLOUD OVER MANY CURRENT NATIONAL BANK SERVICES.

Prior to passage of the National Bank Act Amendments of 1927 (the "McFadden Act"), Pub. L. No. 69-639, 44 Stat. 1224, national banks were generally pro-

hibited from conducting basic banking functions at locations away from their main offices. *See First National Bank of St. Louis v. Missouri*, 263 U.S. 640 (1924). Then, as now, restrictions on branching varied. Some states allowed their banks to establish branches wherever certain prerequisites were met, others allowed each bank to operate only a specified number, and some states allowed no branching at all.[7] Concern arose that allowing the state banks in some jurisdictions to engage in "unlimited branch banking" while permitting national banks no branching for basic services might "mean the eventual destruction of the national banking system." *First National Bank of Logan v. Walker Bank and Trust Co.*, 385 U.S. 252, 257 (1966). The McFadden Act therefore granted national banks the right to establish "branches," "thereby protect[ing them] from the unrestricted branch bank competition of state banks." *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 131 (1969). However, the Act allowed such "branches" to be operated only in a bank's home state, and to ensure "competitive equality" between federal and state banks in this regard, Congress mandated that any national bank "branch" must comply with the same state law restrictions on the number and location of branches applicable to state banks.[8] *See* 385 U.S. at 257-58.

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[7] *See* 1 Fed. Banking L. Rep. (CCH) ¶ 3106 (1985).

[8] The portion of the Act which so provides, 12 U.S.C. § 36(c), states in pertinent part:

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

In adopting these restrictions, Congress emphasized that every site at which a national bank conducted a federally-authorized activity did not necessarily constitute a "branch." In a separate subsection of the Act, "branch" was specifically defined "to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which *deposits are received, or checks paid, or money lent.*" 12 U.S.C. § 36 (f) (1982) (emphasis added). Thus, if a particular banking facility does not fall within this definition of "branch," it is not subject to state law restrictions on the number and location of branches. *Independent Bankers Association of America v. Smith*, 534 F.2d 921, 924 (D.C. Cir.) (holding that if a remote national bank office does not constitute a "branch," it may be located "anywhere (even across state lines)"), *cert. denied*, 429 U.S. 862 (1976).

The discount brokerage offices at issue here do not perform any of the functions enumerated in the McFadden Act's definition of a "branch." *See infra* at 12-13. Nevertheless, a divided District of Columbia Circuit panel, rejecting longstanding rulings of the Comptroller, adopted the district court's analysis and affirmed its conclusion that such offices are "branches." 758 F.2d at 740 (2a); 577 F. Supp. at 260 (20a). The district court had reached this result by adopting a test under which a facility operated by a national bank would be deemed a McFadden Act "branch" if any of its activities, regardless of their nature, "may [be] conduct[ed] at [the bank's] main office." 577 F. Supp. at 260 (20a). But this "main office" test renders the statute's "branch" definition meaningless. Any function that might be performed in a remote national bank facility, by definition, "may [be] conduct[ed]" at the main office. The test thus transforms any and every national bank facility, regardless of function, into a "branch." [9]

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[9] As one court observed in rejecting the "main office" test, it "could not be seriously contended" that a bank establishes a "branch" wherever it sets up an office to perform a service, how-

This interpretation of the Act conflicts directly with the "basic function" test previously suggested by this Court and embraced by several other Circuits. Under that "basic function" test, a national bank facility is a "branch" only if (1) it provides one or more basic banking services of the nature enumerated in the Act's definition of "branch" (*i.e.*, receiving deposits, paying checks, lending money) and (2) its operation would upset the federal-state bank competitive balance as to such basic banking functions. For example, in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969) (*"Plant City"*), this Court concluded that two remote national bank facilities (a teller window-equipped armored car and a drop box for deposits) constituted "branches" under the McFadden Act, but only after an exhaustive examination of whether they provided "basic bank services" that might give a national bank "an advantage in its competition" with state banks. *Id.* at 136-37. Similarly, in determining that a national bank's remote customer-bank communications terminal ("CBCT") constituted a "branch," the Tenth Circuit made a detailed inquiry to determine whether the CBCT performed "traditional banking transaction[s]" that would disturb the "competitive equality" of federal and state banks. *Colorado ex rel. State Banking Board v. First National Bank of Fort Collins*, 540 F.2d 497, 500 (10th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977). Quite recently, in *Independent Bankers Association of New York State, Inc. v. Marine Midland Bank*, 757 F.2d 453, 459-61 (2d Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3007 (U.S. June 27, 1985) (No. 84-2023), the Second Circuit looked for basic banking functions and assessed competitive impact in concluding that a food store-based automatic teller

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ever trivial (*e.g.*, selling railway tokens, food stamps, license plates, Olympic coins, Bicentennial medallions), that also could be performed at the main office. *See Continental Illinois Nat'l Bank & Trust Co. v. Lignoul*, No. 76-C-2209, slip op. at 17 (N.D. Ill. Nov. 9, 1976).

machine used but not owned by a national bank did not constitute a "branch." [10] Even the District of Columbia Circuit previously subscribed to the "basic function" test. *See Independent Bankers Association of America v. Heimann*, 627 F.2d 486, 488 & n.** (D.C. Cir. 1980) (disagreeing with district court conclusion that national bank loan production office not performing basic banking functions was a "branch"); *Independent Bankers Association of America v. Smith*, 534 F.2d 921, 938-40, 941 n.73 943 (D.C. Cir.) (concluding that a national bank's remote CBCT's were "branches" only after detailed evaluation of whether they performed "routine and traditional" banking functions that "closely resembled, in competitive effect" the functions referenced in the Act's "branch" definition), *cert. denied*, 429 U.S. 862 (1976).[11]

The erroneous use of the "main office" test plainly determined the outcome in this case because discount brokerage, like any other national bank activity, may physically be carried on at a bank's main office. Had the proper "basic function" analysis been applied, Security

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[10] *See also Jackson v. First Nat'l Bank of Gainesville*, 430 F.2d 1200, 1202 (5th Cir. 1970) (applying the "basic function" test), *cert. denied*, 401 U.S. 947 (1971).

[11] These five precedents evince the tangible conflict between the two tests. Had the courts applied anything resembling the "main office" test in the three cases where "branches" were found to exist (*i.e.*, *Plant City, Colorado, Smith*), the analysis would have ended posthaste with the readily-apparent finding that the functions at issue (*i.e.*, teller windows, drop boxes, CBCT's) all could have been made available at a main office. Instead, the decisions turned on extensive analyses of the facilities' functions and competitive effect. And in the two cases where the challenged facilities were found not to be "branches" (*i.e.*, *Marine Midland Bank, Heimann*), the use of the "main office" test would have produced an entirely different result because the functions at issue (*i.e.*, teller services and loan production) plainly could have been provided at a main office.

Pacific's discount brokerage offices would not have been deemed "branches." Their activities (*i.e.*, serving as agent in the purchase and sale of stocks, bonds, and options) are fundamentally so distinct from the basic banking functions enumerated in the McFadden Act's "branch" definition that they could not possibly "closely resemble [them] in competitive effect." [12] *Smith*, 534 F.2d at 941 n.73. Application of the "main office" test in this instance will immediately cause certain national banks (including Security Pacific) the substantial and irreparable injury of dismantling or reorganizing discount brokerage operations already developed with the Comptroller's approval [13] and forever bar all national banks from meaningful participation in the discount brokerage market. Failure to resolve promptly the palpable conflict between the "basic function" and "main office" branch tests, however, will have even broader ramifications.

Over the past twenty years, national banks, with the Comptroller's approval, have increasingly engaged not only in discount brokerage activities, but also in many other peripheral banking functions (*e.g.*, consulting services to other banks, business records maintenance for customers, check verification services for merchants, check collection services, installation and operation of electronic credit card verification terminals in stores, audit

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[12] The offices accept money or checks for the purchase of securities, but this can hardly be considered receiving deposits (*i.e.*, placing the money for safekeeping) or "paying checks." (App. C, 31a-33a.) Furthermore, in its application, Security Pacific pledged that loans would not be made at the offices. (*Id.* at 30a-31a).

[13] Ironically, national bank holding companies, which are not subject to the McFadden Act, may continue to operate their discount brokerage subsidiaries irrespective of the outcome here. *See Securities Indus. Ass'n v. Board of Governors*, 104 S. Ct. 3003 (1984). Because of the costs involved, however, the holding company approach to developing discount brokerage operations is not a realistic option for all national banks, particularly smaller ones.

services for other banks, computer software development for banks and other customers, data processing services, and financial and investment consulting).[14] Based on the long-standing presumption that peripheral banking functions were outside the McFadden Act's branching restrictions, these services for some time have commonly been provided at non-branch bank facilities, often outside a national bank's home state.[15] In short, the provision of important peripheral banking services at remote locations has become a firmly-entrenched, integral element of the national banking regime.[16]

Absent reversal, the decision below will prompt non-bank competitors of national banks to seek competitive advantages by challenging all these activities under the erroneous "main office" test. Since national banks would

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[14] *See Comptroller's Policies and Procedures Manual* 4330-11 (rev. 1982). Such activities are frequently conducted through "operating subsidiaries" of national banks, entities which may engage in activities only to the same extent and under the same conditions as their parent banks. *See* Glidden, *The Regulation of National Banks' Subsidiaries*, 40 Bus. Law. 1299, 1302-03 (1985). The Comptroller's ruling that such "operating subsidiaries" may be established is codified at 12 C.F.R. § 5.34 (1985).

[15] *See, e.g., Foreign Bank Act of 1975: Hearing Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 154-56, 433, 509-10 (1976); *International Banking Act of 1977: Hearings Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 301, 473-74, 556, 576 (1977).

[16] For example, pursuant to specific authorization by the Comptroller, *see* 12 C.F.R. § 7.7380 (1985), national banks now maintain hundreds of interstate loan production offices. *See* Dep't of Treasury, *Geographic Restrictions on Commercial Banking in the United States: The Report of the President* 186 n.4 (1981). Further, national banks operate numerous U.S. government and municipal securities dealer offices on an interstate basis. *See Comptroller Release*, [1982-83 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 99,284, at 86,261 (Aug. 26, 1982).

in most instances find transferring all these widely-dispersed peripheral banking functions to main offices or authorized branches in their home states uneconomical or impossible,[17] successful challenges could cause national banks to abandon such activities entirely. Thus, ironically, a statute intended to bolster the competitive position of national banks would become a potent device to force their retrenchment.[18]

Such turmoil is hardly justified by the lower courts' three-part explanation for adopting the "main office" test. First and foremost, reliance was placed on the decision of a divided Eighth Circuit panel which first articulated the test, *St. Louis County National Bank v. Mercantile Trust Co.*, 548 F.2d 716 (8th Cir. 1976) (finding national bank's suburban office performing only trust services, a peripheral bank function, to be a "branch" solely because such services also were performed in the bank's main office), *cert. denied*, 433 U.S. 909 (1977). *See* 577 F. Supp. at 260 (19a-20a). But as noted by the District of Columbia Circuit dissenters below, the Eighth Circuit's analysis had heretofore been "followed nowhere else." [19] 765 F.2d at 1197 (Scalia, J., dissenting, joined by Bork and Starr, JJ.).

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[17] For example, due to high land and rent costs, it would be very expensive for many national banks to carry on data processing services at the prime real estate locations where main offices and branches are likely to be situated. Similarly, the whole purpose of interstate loan production offices (*i.e.*, easy access to potential customers) would be eliminated if they could be maintained only at authorized branches in a national bank's home state.

[18] Such challenges have already begun. *See, e.g.*, 44 Wash. Fin. Rep. (BNA) 885 (May 20, 1985) (reporting a federal suit filed in the District of Columbia by insurance companies challenging New York national bank's Wisconsin-based operating subsidiary).

[19] As noted in the forceful dissent to the Eighth Circuit decision, national bank involvement in trust services was "well known to Congress," and "if Congress had intended to include in its definition of a 'branch' a trust office . . ., it would have said so just as it specifically mentioned the accepting of deposits, the cashing

Second, acceptance of the "main office" test also was based on a brief post-enactment remark by Rep. McFadden that the term "branch" includes "'[a]ny place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, *or transacting any business carried on at the main office.*'" 577 F. Supp. at 259 (18a-19a) (quoting 68 Cong. Rec. 5816 (1927)) (emphasis added). But this statement reflects nothing more than "personal views" which clearly were not part of the enactment process and are entitled to no weight.[20] Nothing in the Act or its legislative history indicates that Congress meant to restrict the location of national bank activities other than basic banking functions of the nature enumerated in the statute (*i.e.*, the receipt of deposits, the payment of checks, or the making of loans). If Congress had intended the all-encompassing definition created by the "main office" test, it could have simply stated that all national bank offices, regardless of function, are "branches."[21] Moreover, since the McFadden Act also explicitly amended prior law to expand national bank authority to conduct transactions in investment securi-

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of checks, and the lending of money." 548 F.2d at 721 (Henley, J., dissenting). Outside of the Eighth Circuit, national banks have continued to establish and maintain suburban trust offices.

[20] *See Bread Political Action Comm. v. FEC*, 455 U.S. 577, 582 n.3 (1982); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *Petry v. Block*, 697 F.2d 1169, 1171 (D.C. Cir. 1983) (per curiam). The statement is a particularly unreliable indicator of legislative intent given Rep. McFadden's prior unsuccessful opposition to all branching by both federal and state banks. *See* 67 Cong. Rec. 2829, 2832 (1926).

[21] By ignoring the explicitly narrow reach of the statutory definition of "branch," the courts below failed to follow the rule that "[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Petry v. Block*, 697 F.2d 1169, 1171 (D.C. Cir. 1983) (per curiam).

ties, *see* 67 Cong. Rec. 2829-30 (1926) (statement of Rep. McFadden); Pub. L. No. 69-639, § 2(b), 44 Stat. 1224, 1227 (1927), if Congress had wished to limit the location of these activities, it presumably would have included them among the carefully delineated restricted functions in the statute's "branch" definition.[22]

Finally, the courts below found justification for the "home office" test in dicta from *Plant City* stating that the Act's "branch" definition "suggests a *calculated indefiniteness* with respect to the outer limits of the term." *See* 577 F. Supp. at 259 (19a) (quoting 396 U.S. at 135) (emphasis added). But implicit in the *Plant City* statement is the notion that there are some limits to the Act's "branch" definition. Because the "home office" test

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[22] Arguments that the Act's limitations extend to non-basic banking functions misapprehend what prompted the legislation. The Act was intended merely to correct national banks' competitive disadvantage as to basic banking services. *See supra* at 8-9. No comparable correction was needed as to other services since they were not perceived as being subject to locational restrictions. For example, years earlier, this Court had held that a national bank could provide check certification services away from its main office. *Merchants' Nat'l Bank of Boston v. State Nat'l Bank of Boston*, 77 U.S. (10 Wall.) 604, 651 (1871). And in the pre-McFadden Act case which declared that national banks could not operate branches in the first place, *see supra* at 8-9, this Court relied on a statute indicating that this bar concerned only " 'operations of discount and deposit,' " not non-basic banking functions. *First Nat'l Bank of St. Louis v. Missouri*, 263 U.S. 640, 657 (1924). Later in its analysis, *id.* at 658, the Court also cited with approval a "well considered opinion" in which the Attorney General stated that "[th]ese cases clearly indicate . . . a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on the general banking business." *Lowry National Bank*, 29 Op. Att'y Gen. 81, 87 (1911). In sum, the McFadden Act's branching restrictions arose out of concern that national banks would establish "many agencies for *receiving deposits* and *paying checks*," not multiple locations for providing non-basic banking services. *See* 66 Cong. Rec. 1627 (1925) (statement of Rep. Stevenson) (emphasis added) (quoted in *Plant City*, 396 U.S. at 138 n.11).

adopted below admits of no such limits, the test is actually in direct conflict with *Plant City*. Moreover, as noted by the three dissenting judges below,

> a statute containing a "calculated indefiniteness" presents precisely the situation in which our deference to the agency should be at its height. *See Chevron, USA, Inc. v. NRDC, Inc.*, 104 S. Ct. 2778, 2782 (1984). The Comptroller's conclusion that discount brokerage houses do not fall within the range of indefiniteness—or indeed that the range includes *only* the [three] enumerated functions [in the definition]—cannot by any means be considered unreasonable, even if we think it mistaken.

765 F.2d at 1198 (42a) (Scalia, J., dissenting, joined by Bork and Starr, JJ.) (emphasis in original).[23]

II. THE DECISION BELOW EFFECTIVELY ELIMINATES THE "ZONE-OF-INTERESTS" TEST FOR STANDING AND INVITES THIRD PARTIES TO SEEK JUDICIALLY-CREATED COMPETITIVE ADVANTAGES THROUGH THE McFADDEN ACT AND OTHER STATUTES NEVER INTENDED FOR THAT PURPOSE.

The threat of McFadden Act challenges to established peripheral national bank activities, such as securities brokerage, is magnified by the lower courts' conclusion that non-banks, like SIA, have standing to pursue McFadden Act claims even though that legislation plainly was intended to protect banks only. This holding that federal courts may simply ignore or give only lip-service to the well-settled "zone-of-interests" test conveys a message likely to have effects well beyond the banking industry. Indeed, if the decision is not reversed, parties

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[23] *See also Independent Bankers Ass'n of N.Y. State, Inc. v. Marine Midland Bank*, 757 F.2d 463, 461 (2d Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3007 (U.S. June 27, 1985) (No. 84-2023); *Washington, Dep't of Ecology v. EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985); *Chisholm v. FCC*, 538 F.2d 349, 357-58 (D.C. Cir.), *cert. denied*, 492 U.S. 890 (1976).

will routinely ask courts to enhance their competitive position over others through statutes Congress obviously did not intend for that purpose.

Only litigants who can demonstrate standing may invoke the power of federal courts to resolve "cases" and "controversies" under Article III of the Constitution. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). A party must show, *inter alia*, that it has suffered "injury in fact," *id.* at 473, and that its complaint falls "arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970). *See Valley Forge*, 454 U.S. at 475.

These two requirements are separate and distinct. A mere showing of injury does not establish that a party is within the "zone of interests." *See, e.g., Leaf Tobacco Exporters Association v. Block*, 749 F.2d 1106, 1112 (4th Cir. 1984); *Fire Equipment Manufacturers' Association v. Marshall*, 679 F.2d 679, 681 (7th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). Yet in this case, SIA was found to be within the "zone of interests" of the McFadden Act merely because the lower court believed that a purported failure to enforce the Act's branching provisions "would harm SIA's members." 577 F. Supp. at 259 (17a). As Judge Scalia's dissent to the panel opinion aptly stated, however, this analysis impermissibly "conflates" the "injury-in-fact" and "zone-of-interests" requirements, 758 F.2d at 740 (3a); the courts below never made a separate inquiry into whether SIA's claims were within the "zone-of-interests" to be protected by the McFadden Act.[24]

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[24] Even if the district court can be read to have engaged in a "zone-of-interests" analysis, its conclusion that the McFadden Act was intended "to curb the scope of national banks' activities" in general, 577 F. Supp. at 258 (17a), is unaccompanied by any analysis of the legislative history (which in any event does not support such a conclusion, *see infra* at 21).

The district court's mistaken standing analysis threatens to upset the balance struck by Congress not only in the McFadden Act, but in many other statutes intended to protect or regulate a specific class of persons. Applied to such statutes, the "zone-of-interests" test helps to "measure the appropriate contours of the protections afforded" by Congress by "plac[ing] control of the legal situation in the hands of those whom Congress considered most immediately concerned." Nichol, *Rethinking Standing*, 72 Calif. L. Rev. 68, 96 (1984).[25] Thus, where Congress has acted to protect a particular class, "the zone test works to prevent groups outside of the class from usurping the legislative entitlement." *Leaf Tobacco Exporters Association v. Block*, 749 F.2d 1106, 1115 (4th Cir. 1984).

Accordingly, most Circuits have held that where a statute was intended to protect a determinate group, plaintiffs not within that group may not bring suit, even though they suffer injury in fact. *See, e.g., Fire Equipment Manufacturers' Association v. Marshall*, 679 F.2d 679, 681 (7th Cir. 1982) (fire equipment manufacturers lack standing to challenge equipment standards where the governing statute was intended only to protect workers), *cert. denied*, 459 U.S. 1105 (1983); *Leaf Tobacco Exporters Association v. Block*, 749 F.2d 1106, 1115 (4th Cir. 1984) (tobacco exporters lack standing to challenge decision allowing growers' cooperative to sell directly to foreign purchasers under statute intended to benefit only tobacco farmers); *Rhode Island Committee on Energy v. General Services Administration*, 561 F.2d 397, 402 (1st Cir. 1977) (neighbors of surplus navy yard lack standing to block sale of government land for construction of

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[25] "If the interests which the law chooses to protect are satisfied with the status quo though it may involve an alleged violation, why should a stranger have a right to insist on enforcement?" Jaffe, *Standing Again*, 84 Harv. L. Rev. 633, 637 (1971).

nuclear power plant under statute regulating sale of surplus property).[26]

If the courts below had conducted a proper "zone-of-interests" inquiry in this case, they undoubtedly would have found that the McFadden Act and its legislative history provide no indicia that the Act was intended to benefit brokerage competitors of national banks. As discussed previously, *see supra* at 8-9, the McFadden Act was intended "to place national and state banks on a basis of 'competitive equality' insofar as branch banking was concerned." *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966). On its face, the relevant provision does nothing more than address the competitive positions of national and state banks, and any suggestion that it contemplates non-bank competitors (*e.g.*, brokerage firms) at all is entirely contrary to the Act's explicit purpose. *See supra* at 8-9. Thus, while state banks presumably are within the zone of interests protected by the Act, SIA's members "are no more within it than are businesses competing for the parking spaces that an unlawful branch may occupy." 765 F.2d at 1197 (40a) (Scalia, J., joined by Bork and Starr, JJ., dissenting).[27]

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[26] Prior to this decision, the District of Columbia Circuit also appeared to recognize the importance of conducting a distinct "zone-of-interests" analysis. *See Glass Packaging Inst. v. Regan*, 737 F.2d 1083, 1088 (D.C. Cir.) (glass bottle manufacturers lack standing to challenge decision allowing sale of liquor in plastic bottles since relevant statute was concerned with "safeguarding the revenues" and not with regulating liquor bottle competition), *cert. denied*, 105 S. Ct. 509 (1984); *Copper & Brass Fabricators Council, Inc. v. Department of the Treasury*, 679 F.2d 951, 952 (D.C. Cir. 1982) (copper manufacturers not within the "zone of interests" of a statute authorizing the Secretary of the Treasury to decrease the copper content of the penny "'to assure an adequate supply of coins to meet national needs'").

[27] Unlike the McFadden Act, some statutes are intended to preclude national bank operations competing with non-bank entities

The McFadden Act was intended to provide both national and state banks with a mechanism that each could use to ensure competitive equality between them, but that each would use wisely because of the Act's reciprocal effect.[28] The decision below, however, allows interlopers to utilize that mechanism with impunity to serve their own self-interest. Congress could not have desired this result which, compounded by the lower courts' misinterpretation of the Act's "branch" definition, *see supra* at 8-18, will invite disruptive challenges to other peripheral but important national bank activities. Further, if not reversed, the decision will serve as precedent for creating a similar free-for-all in the context of other statutes intended solely for the protection of specific groups.[29]

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in fields unrelated to banking. *See Securities Industry Ass'n v. Board of Governors*, 104 S. Ct. 3003, 3009-12 (1984) (considering the Glass-Steagall Act); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (considering the Bank Service Corporation Act, 12 U.S.C. § 1864). The fact that SIA may have standing to raise its claims under the Glass-Steagall Act cannot give it standing to raise claims under the McFadden Act, which embodies "different goals and policies." *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 141 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). *See also FAIC Securities, Inc. v. United States*, 768 F.2d 352, 357 (D.C. Cir. 1985).

[28] For example, if a state bank successfully argued that a national bank could not under state law perform a function at a particular location, that restriction would apply equally to state banks.

[29] *See, e.g.*, the statutes at issue in the cases discussed *supra* at 20-21.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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Dated: December 9, 1985

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 84-5026, 84-5085

SECURITIES INDUSTRY ASSOCIATION

v.

COMPTROLLER OF THE CURRENCY, *et al.*,
Appellants.

SECURITIES INDUSTRY ASSOCIATION,
Appellant,

v.

C.T. CONOVER, Comptroller of the Currency,
Office of the Comptroller of the Currency

Argued March 25, 1985

Decided April 12, 1985

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 82-02865)

Mark H. Gallant, Atty., Dept. of Justice, Washington, D.C., with whom Richard K. Willard, Acting Asst. Atty. Gen., Joseph E. diGenova, U.S. Atty., Mark Leemon,

Atty., Office of the Comptroller of the Currency, and Anthony J. Steinmeyer, Atty. Dept. of Justice, Washington, D.C., were on the brief, for appellants in No. 84-5026 and appellee in No. 84-5085.

James B. Weidner, New York City, with whom John M. Liftin, Washington, D.C., was on the brief, for appellant in No. 84-5085 and appellee in No. 84-5026.

Before WRIGHT, GINSBURG, and SCALIA, Circuit Judges.

Opinion for the court PER CURIAM.

Opinion concurring in part and dissenting in part filed by Circuit Judge SCALIA.

PER CURIAM:

This court is in agreement with the result reached by the District Court, generally for the reasons stated in its Memorandum Opinion. *See Securities Industry Ass'n v. Comptroller of the Currency*, 577 F. Supp. 252 (D.D.C. 1983). We note also that the District Court's Glass-Steagall Act analysis receives substantial support from a Supreme Court opinion issued while these cases were pending on appeal. *See Securities Industry Ass'n v. Board of Gov. of FRS*, —— U.S. ——, 104 S.Ct. 3003, 82 L.Ed.2d 158 (1985).

Affirmed.

SCALIA, Circuit Judge, concurring in part and dissenting in part:

I concur in the court's disposition with regard to the Glass-Steagall Act. Instead of affirming the District Court's resolution of the McFadden Act issue on the merits, I would vacate and remand with instructions to dismiss for lack of jurisdiction.

The District Court found that SIA had standing to challenge the Comptroller's ruling that discount broker-

age offices operated by national banks are not subject to the locational restrictions of the McFadden Act and the National Banking Act because "attempts to exceed those curbs would harm SIA's members. . . ." *Securities Industry Ass'n v. Comptroller of the Currency*, 577 F. Supp. 252, 258-59 (D.D.C. 1983). This conflates the constitutional requirement of injury in fact and the separate requirement that "Congress [have] intended to place the plaintiffs within the zone of interests protected or regulated by the statute." *Glass Packaging Institute v. Regan*, 737 F.2d 1083, 1090 (D.C. Cir. 1984). In my view, state banks and possibly federal banks, but not all businesses injured in fact, are within the zone of interests protected by the branch banking restrictions. *See, e.g., id.* at 1088-89; *Copper & Brass Fabricators Council, Inc. v. Department of the Treasury*, 679 F.2d 951, 952-53 (D.C. Cir. 1982); *Tax Analysts and Advocates v. Blumenthal*, 566 F.2d 130, 138, 144-45 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 82-2865

SECURITIES INDUSTRY ASSOCIATION,
Plaintiff,

v.

COMPTROLLER OF THE CURRENCY, *et al.*,
Defendants.

Nov. 2, 1983

John M. Liftin, James B. Weidner, Harry M. Yohalem, Thomas M. Shoesmith, Rogers & Wells, Washington, D.C., William J. Fitzpatrick, New York City, Donald J. Crawford, Securities Industry Association, Washington, D.C., for plaintiff.

Alphonse M. Alfano, Harriet Kerwin, Civil Div., U.S. Dept. of Justice, and Brian W. Smith, Ronald Glancz, Donald N. Lamson, Ginger S. Baraum, Washington, D.C., for defendants.

Leonard H. Becker, Arnold & Porter, Washington, D.C., amicus curiae for Planter Nat. Bank of Memphis.

B. Boyd Hight, O'Melveny & Myers, Washington, D.C., amicus curiae for Security Pacific Nat. Bank.

Robert S. Rifkind, Cravath, Swain & Moore, New York City, amicus curiae for N.Y. Clearing House Ass'n.

William H. Smith, American Bankers Association, Washington, D.C., amicus curiae for American Bankers Ass'n.

MEMORANDUM OPINION

FLANNERY, District Judge.

This matter is before the court on cross-motions for summary judgment. Plaintiff Securities Industry Association ("SIA"), a national trade association representing more than five hundred securities brokers, dealers and underwriters, challenges the actions of the Comptroller of the Currency, C.T. Conover, in approving the applications of two national banks for the establishment or purchase of discount securities brokerage subsidiaries. For the reasons set forth below, plaintiff's motion is granted in part and the Comptroller's decision is reversed.

Facts

On June 23, 1982 Union Planters National Bank of Memphis applied to the Comptroller for approval of the acquisition by Union Planters of Brenner Steed and Associates, Inc., a discount brokerage business in Memphis, Tennessee. In its application Union Planters said it intended to offer securities brokerage services through Brenner Steed at certain branch offices of Union Planters in Tennessee, at affiliated banks in Tennessee, and at correspondent banks in Tennessee and six other states.

On July 2, 1982 Security Pacific National Bank applied to the Comptroller for approval of its proposed establishment of a new operating subsidiary to provide discount brokerage services. In its application Security Pacific said the new subsidiary would offer brokerage services at certain Security Pacific branch offices and might in the future offer those services at non-branch offices in California and other states. The new subsidiary will process and extend margin loans.

Brenner Steed is, and the Security Pacific subsidiary will be, "discount" brokerages, which will buy and sell securities solely as agent, on the order and for the ac-

count of customers. Neither will purchase or sell securities for its own account, nor engage in underwriting, nor give investment advice. "Discount" brokers are so characterized because their commissions are significantly lower than those charged by full-service brokers who, in addition to trading on behalf of customers, offer investment advice.

On August 26, 1982 the Comptroller approved the Security Pacific application. On September 20, 1982 the Comptroller approved the Union Planters application, and in September, 1982 Union Planters acquired Brenner Steed. This action followed.

Discussion

SIA argues that the Comptroller's decisions should be set aside as in excess of his statutory authority for two reasons. First, the operation of a brokerage business by a national bank or its affiliate violates Sections 16 and 21 of the Glass-Steagall Act of 1933, 12 U.S.C. §§ 24 Seventh, 378. Second, the operation of a brokerage business by a national bank or its affiliate at offices other than those branches which the bank is allowed to establish consistent with state law violates the McFadden Act, 12 U.S.C. §§ 36, 81. The court addresses these two arguments below.

A. *Standard of review*

The degree of deference due the Comptroller was described by this court in *New York Stock Exchange v. Smith*, 404 F. Supp. 1091 (D.D.C. 1975), *vacated on other grounds*, 562 F.2d 736 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 942, 98 S.Ct. 1520, 55 L.Ed.2d 538 (1978) (*"NYSE"*):

> At the outset, the court notes that it gives "great weight" to the Comptroller's ruling. The Supreme Court has consistently held that reasonable construc-

> tions of regulatory statutes by the agencies charged with enforcement of those statutes are to be respected by reviewing courts. . . . The Comptroller's [ruling] will be respected, even if the court would have reached a different result were this a question of first impression.

404 F. Supp. at 1096 (Citations omitted). The reasons for the deference accorded the Comptroller are similar to those given by the court in *A.G. Becker, Inc. v. Board of Governors*, 693 F.2d 136 (D.C. Cir. 1982), explaining its deference to the opinions of that other federal body charged with banking regulation, the Board of Governors of the Federal Reserve System. In *A.G. Becker* plaintiffs, including SIA, challenged the Board's decision to allow Bankers Trust Company to act as agent in the sale of commercial paper. In upholding the Board's decision, and in reversing the district court, the court of appeals explained that the Board's decision warranted deference because of the scope of the Board's authority, its expert knowledge of commercial banking, and its application of general, undefined statutory terms to particular facts. The court wrote:

> The regulatory structure of the banking laws must be permitted to adapt to the changing financial needs of our economy. Congress has delegated to the Federal Reserve Board, rather than to this court, the complex task of applying the Act's general proscriptions to the current business reality. We must therefore defer to the Board's interpretation of the statute if that interpretation is reasonable.

693 F.2d at 141. For the same reasons, this court must uphold the Comptroller's decision if it is reasonable.

B. *The Glass-Steagall Act*

1. *The Act does not limit bank affiliates to securities transactions solely for pre-existing customers*

SIA argues that Glass-Steagall permits banks to provide brokerage services only to pre-existing, bona fide bank customers. Glass-Steagall, says SIA, intended to erect impenetrable barriers between commercial banks and investment banks in order to avoid the kind of rampant speculation of the 1920's which brought the banking system to the brink of collapse, when banks would use depositors' money to push speculative securities out on the market. In support of its argument SIA points to two provisions of Glass-Steagall. Section 21, 12 U.S.C. § 378, prohibits any organization "engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail . . . securities . . ." from engaging at the same time in the banking business.[1] Discount brokers engage in the retail purchase and sale of securities and so, argues the SIA, are prohibited from being part of a banking business at the same time.

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[1] Section 21 of the Glass-Steagall Act, 12 U.S.C. § 378, provides in pertinent part:

> [I]t shall be unlawful . . . [f]or any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor: *Provided*, That the provisions of this paragraph shall not prohibit national banks or State banks or trust companies . . . or other financial institutions or private bankers from dealing in, underwriting, purchasing, and selling investment securities to the extent permitted to national banking associations by the provisions of section 24 of this title.

Section 16, 12 U.S.C. § 24 Seventh, limits bank brokerage activity to that "upon the order, and for the account of, customers . . ." [2] This section, says SIA, is a very limited exception to the otherwise unyielding barrier between commercial and investment banking established by Glass-Steagall, and exists only in order to accommodate existing bank customers. In support of its position, SIA cites several early Comptroller opinions holding that Section 16 limits bank brokerage transactions to those performed for customers of the bank whose relationship with the bank exists independently of the securities transaction. *See, e.g.*, 1 *Bulletin of the Comptroller of the Currency* No. 2 at 2 (Oct. 26, 1936). Although the first such opinion dates from 1936, SIA maintains that the Comptroller has affirmed that interpretation of Section 16 until today. The SIA concedes that the Comptroller modified his position in 1974 when, in approving an application to provide Automatic Investment Services, a ruling upheld by this court in *New York Stock Exchange v. Smith, supra*, the Comptroller reversed his prior interpretations to say that "accommodation" did not mean that banks could not charge customers for the brokerage service. But the Comptroller left untouched, says SIA, the requirement that the customer relationship exist independent of the securities transaction conducted as part of the brokerage services.

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[2] Section 16 of the Glass-Steagall Act, 12 U.S.C. § 24, Seventh, provides in pertinent part:

> The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association will not underwrite any issue of securities or stock: *Provided*, That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe.

The court is not persuaded by SIA. The language of Section 16 limiting bank securities to those "for the account of customers" does not limit bank brokerage activity, but serves to distinguish such activity from buying and selling of securities by the bank for its own account. Despite the exhaustive cataloging in the legislative history of Glass-Steagall of the ills arising out of the previous intermingling of investment and commercial banking, *see, e.g.*, S.Rep. No. 77, 73rd Cong., 1st Sess. 8-10 (1933), there is no mention of limiting bank brokerage activity. On the contrary, the one mention appearing in the legislative history says that Glass-Steagall will permit national banks to sell and buy securities for their customers "to the same extent as heretofore." *Id.* at 16. And as the Comptroller demonstrates, through citation both to earlier case law and secondary sources, prior to the passage of Glass-Steagall banks offered brokerage services to members of the general public, and not just to existing customers. *See, e.g., Blakey v. Brinson*, 286 U.S. 224, 52 S.Ct. 516, 76 L.Ed. 1089 (1932); *McNair v. Davis*, 68 F.2d 935 (5th Cir. 1934), *cert. denied*, 292 U.S. 647, 54 S.Ct. 780, 78 L.Ed. 1497 (1934).

The early opinions of the Comptroller relied on by SIA embody "an overcautious approach to bank regulation reflecting the atmosphere of the years immediately after the 1929 market crash . . ." *NYSE*, *supra*, 404 F.Supp. at 1097, and have gradually been disavowed by the Comptroller in the intervening decades. As the Comptroller stated in 1974, commenting on his reversal of an earlier decision disallowing bank charges for brokerage services:

> This [earlier] view, like many others expressed by regulators, in the immediate post-depression decades, was designed to be ultra-conservative and to confine banks as narrowly as possible in their activities. However, in this regard, the office apparently went further in the direction of conservatism than did the Congress, since neither the word nor the idea of the

"accommodation" limitation appears in the statute or in any committee or floor comments.

Letter from James E. Smith, Comptroller of the Currency, to G. Duane Vieth (June 10, 1974), *reprinted in* [1973-78] Fed. Banking L. Rep. (CCH ¶ 96,272).

The court's understanding of the scope of the prohibitions of Glass-Steagall is reinforced by analysis of Section 20 of the statute, 12 U.S.C. § 377, which provides that a bank may not be affiliated with any organization which is "engaged principally in the issue, flotation, underwriting, public sale, or distribution of stocks, bonds, debentures, notes or other securities."[3] The language of Section 20 makes clear that the line Congress sought to draw between commercial and investment banking did not prohibit bank affiliate brokerage activity. The prohibition of Section 20 is clearly aimed at the investment banking business by which large blocks of securities newly-issued by corporations are brought by investment banks for resale to the public. In such a transaction the investment banks buy for their own account and assume the risk that the market may not be receptive to these securities. Such activities are, therefore, fundamentally different from brokerage activities, where the broker buys and sells only as agent and for the account of the customer. The phrase "at retail" in the statute may not be read to encompass brokerage activities because it must be read consistently with the other words in the same phrase. *Third National Bank in Nashville v. Impac, Ltd.*,

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[3] Section 20 of the Glass-Steagall Act, 12 U.S.C. § 377, provides in pertinent part:

> [N]o member bank shall be affiliated . . . with any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities.

432 U.S. 312, 322, 97 S.Ct. 2307, 2313, 53 L.Ed.2d 368 (1977).

The court's conclusion is in accord with the opinion of the Board of Governors of the Federal Reserve Board approving the purchase by Bank America Corporation, a bank holding company regulated by the Board pursuant to the Bank Holding Company Act, 12 U.S.C. § 1841 *et seq.*, of the discount brokerage services through its wholly-owned subsidiary Charles Schwab & Co., Inc., 69 Fed.Res.Bull. 105 (1983). In its opinion the Board analyzed Sections 20 and 16 of the Glass-Steagall Act and concluded that the acquisition and operation of a discount brokerage service by a member bank was consistent with both the language and purpose of the Act. The Board's opinion was affirmed by the Second Circuit in *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 716 F.2d 92 (2d Cir. 1983).

2. *The requirement that bank purchases and sales of securities be "without recourse" does not prohibit brokerage activity by bank subsidiaries*

Section 16 of Glass-Steagall limits bank securities dealings to buying and selling of securities "without recourse." SIA contends that the phrase "without recourse" must not be given a technical, commercial meaning, but must be read broadly, SIA relies on the case of *Awotin v. Atlas Exchange Bank of Chicago*, 295 U.S. 209, 55 S.Ct. 674, 79 L.Ed. 1393 (1935), where the Supreme Court wrote:

> The phrase is broader than a mere limitation upon the power to contract, although embracing that limitation. It is a prohibition of liability, whatever its form, by way of "recourse" growing out of the transaction of the business.

A brokerage subsidiary of a national bank could become contingently liable on a securities transaction, argues SIA, if the customer buyer failed to pay for the securities or if the customer seller failed to deliver the securities as promised. Such liability is prohibited by the "without recourse" limitation, says SIA.

SIA's reliance on *Awotin* is misplaced. In that case banks had agreed by separate contract to repurchase bonds at maturity at par plus accrued interest—the very sort of guarantee the Comptroller admits is prohibited by Section 16, but which is absent from a brokerage transaction. The *Awotin* court simply held that the "without recourse" language reached "any other form of contract by which the bank assumes the risk of loss which would otherwise fall on the buyer of securities." 295 U.S. at 211-12, 55 S.Ct. at 675-76. This is not the risk a bank incurs in a brokerage transaction.

As the Federal Reserve Board explained in its *Bank America* decision: "The ordinary commercial meaning of 'without recourse' indicates that section 16 prohibits a bank from assuming the liability of endorser or maker with respect to the securities bought or sold as agent of the customer." *In re Bank America Corp.*, 69 Fed. Res. Bull. at 115, n. 50. The Second Circuit upheld that determination, writing:

> [W]e do not think that Schwab trades "without recourse" simply because it faces the kind of incidental liability to which SIA refers. Schwab can maintain actions for breach of contract against customers who fail to pay for or deliver securities and thus, giving the words their ordinary meaning, is not "without recourse" against such customers.

Securities Industry Association v. Board of Governors of the Federal Reserve System, supra, 716 F.2d 92 at 100 n. 4.

In accordance with the foregoing, the court holds that the Glass-Steagall Act does not prohibit the ownership and operation by national banks of subsidiaries engaged in the brokerage business.

C. *The McFadden Act*

The National Bank Act of 1864, which created national banks, originally allowed national banks to operate only out of one central office named in the bank's certificate of incorporation. The statute provided:

> The usual business of each national banking association shall be transacted at an office or banking-house located in the space specified in its organization certificate.

R.S. 5190 (1864).

Later, state banks began to establish branch offices. In order to equalize competition between state and national banks Congress amended the banking laws in 1972 in the McFadden Act to provide that national banks could carry on their general business not only at the central office, but also at branch offices which they could establish, upon Comptroller approval, to the extent which state law permitted state banks to establish branches. Section 8 of the McFadden Act amended the National Bank Act to provide:

> The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with [12 U.S.C. § 36].

R.S. 5190, 12 U.S.C. § 81.

"Branches" were defined in Section 36(f) of the Act:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of busi-

> ness . . . at which deposits are received, or checks paid, or money lent.

12 U.S.C. § 36(f).[4]

SIA argues that, if it is legal for national banks to carry on brokerage activity through their subsidiaries, then at the very least the banks' operation of their brokerages must be limited to the branch offices they are presently permitted. Both Union Planters and Security Pacific indicated their intention to operate their brokerage subsidiaries at non-branch offices within their respective states, as well as at offices in other states across the country. Still, the Comptroller approved their applications. The Comptroller's decision, contends SIA, exceeded his authority and is contrary to the branching restrictions of the McFadden Act and so must be overturned.

1. *Standing*

The Comptroller responds to SIA's challenge by arguing first that SIA is without standing to bring it. Any additional injury which SIA might suffer from the loca-

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[4] 12 U.S.C. § 36 provides, in pertinent part:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.
>
> * * * *
>
> (f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business at which deposits are received, or checks paid, or money lent.

tion of brokerage subsidiary offices at places other than the bank's central office and chartered branches is speculative, says the Comptroller. And the McFadden Act branching restrictions were designed to promote competitive equality between state and national banks, not to protect securities dealers. SIA can show no injury and is not within the zone of interests sought to be protected by the Act, concludes the Comptroller, and therefore is without standing to challenge the Comptroller's decision under the Act.

The Comptroller's argument is not persuasive. In *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) (*"Data Processing"*), the Supreme Court held that an organization of providers of data processing services had standing to challenge a ruling by the Comptroller permitting national banks to make data processing services available to other banks and to bank customers. The organization had standing, the court explained, in part because they had alleged that "competition by national banks in the business of providing data processing services might entail some future loss of profits for petitioners." 397 U.S. at 152, 90 S.Ct. at 829. Similarly, SIA has alleged that its members' profits will suffer if national banks are allowed to operate brokerage subsidiaries in competition with them. And it is obvious that the greater number of offices from which banks are allowed to conduct their brokerage business, the greater will be the inroads the banks will be able to make into the business of SIA's members. Accordingly, SIA has alleged sufficient injury to confer standing.

Nor need there be any explicit expression in the statute or its legislative history for the court to find that SIA is within the zone of interests protected by the McFadden Act. In *Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 91 S.Ct. 158, 27 L.Ed.2d 179 (1970), the Supreme Court reversed the dismissal for lack of standing of a complaint by independent travel agents who challenged the Comptroller's

ruling that national banks may provide travel services for their customers. The court, relying on *Data Processing*, noted "a growing trend 'toward enlargement of the class of people who may protest administrative action.' " 400 U.S. at 46, 91 S.Ct. at 159. The court in *Data Processing* "did not rely on any legislative history showing that Congress desired to protect data processors alone." *Id.* The question is whether a challenged statute " 'arguably brings a competitor within the zone of interests protected by it.' " *Id.*

The only mention of *Data Processing* of the legislative history of the statutory provision at issue was that the provision was a "response to the fears expressed by a few senators, that without such a prohibition, the bill would have enabled 'banks to engage in a nonbanking activity,' and thus constitute 'a serious exception to the accepted public policy which strictly limits banks to banking.' " *Arnold Tours, supra*, 400 U.S. at 46 n. 3, 91 S.Ct. at 159 n. 3, quoting *Data Processing, supra*, 397 U.S. at 155, 90 S.Ct. at 830 (citations omitted). Similarly here, the branching restrictions of the McFadden Act, read in conjunction with the original restrictions of the National Bank Act limiting national banks to one central office, evince the intent of Congress to curb the scope of national banks' activities. To be sure, the McFadden Act restricts national banks not in the type of business they may conduct but where they may conduct it. Still, attempts to exceed those curbs would harm SIA's members just as the data processors in *Data Processing* and the tour operators in *Arnold Tours*. Accordingly, SIA is arguably within the zone of interests sought to be protected by the Act.

2. *The McFadden Act limits the business of a national bank's discount brokerage subsidiary to the bank's central office and chartered branches*

On the merits, the Comptroller argues that the branching restrictions of the McFadden Act apply only to the

three activities which are enumerated in the definition of "branch" within the statute: receipt of deposits, payment on checks, or lending money. Only one of these activities will even arguably exist at the brokerage offices—the lending of money when the brokerage extends margin loans to customers, but those loans will only "originate" at the brokerage offices. Final approval will be given at the central office, and under Comptroller regulations, 12 C.F.R. § 6.7380, the origination of a loan later approved at another office does not constitute the lending of money by the originating office. Because brokerage activities are not among those enumerated in the Act, says the Comptroller, its restrictions do not apply. In any event, he concludes, the Act limits only the branches which a national bank may have within the state of its central office. No restrictions apply to offices outside that state.

After careful consideration of the Comptroller's decision, and with due regard for the deference owed him, the court finds that the Comptroller exceeded his authority, in contravention of law, in approving the applications of Union Planters and Security Pacific without regard to the branching restrictions of the McFadden Act. The Comptroller's literal reading of the statute is contradicted, first, by the legislative history of the Act. Shortly after the Act's passage, its sponsor, Representative McFadden, placed a section-by-section analysis of it in the Congressional Record. That analysis described the definition of "branch" in Section 36(f) as follows:

> [Section 36(f)] defines the term "branch." Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or *transacting any business carried on at the main office* is a branch if it is legally established under the provisions of this act.

68 Cong. Rec. 5816 (1927) (emphasis added). Although the Comptroller urges the court to disregard Representa-

tive McFadden's remarks because they came after the Act's passage, other courts have cited the above passage as authoritative. *See, e.g., First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 134 n. 8, 90 S.Ct. 337, 343 n. 8, 24 L.Ed.2d 312 (1969); *Independent Bankers Association of America v. Smith*, 534 F.2d 921, 931-32 (D.C. Cir. 1976).

The Supreme Court has indicated that a broader, more flexible interpretation must be made of the statute than that followed by the Comptroller. In *Dickinson, supra*, the Comptroller gave a national bank in Florida permission to operate an armored car and a secured receptacle in a shopping center, both staffed by tellers, for the receipt of deposits and cashing of checks by customers. State banking regulators ordered the bank to stop providing the off-premises services because Florida law prohibits branch banking altogether. The bank brought suit for declaratory and injunctive relief in federal court. The Supreme Court held that the off-premises services constituted a "branch" in violation of the McFadden Act, and in doing so explained:

> Although the definition may not be a model of precision in part due to its circular aspect, it defines the minimum content of the term "branch" by use of the word "include". The definition suggests a *calculated indefiniteness* with respect to the outer limits of the term. However, the term "branch bank" at the very least includes any place for receiving deposits or paying checks or lending money apart from the chartered premises; *it may include more.*

396 U.S. at 135, 90 S.Ct. at 344 (emphasis added).

Other courts faced with similar questions have expressly held that bank offices at which business is conducted other than the three functions enumerated in the Act nonetheless are "branches" within Section 36 and therefore subject to state law restrictions on branch locations. In *St.*

Louis County National Bank v. Mercantile Trust Company National Association, 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909, 97 S.Ct. 2975, 53 L.Ed.2d 1093 (1977), the Comptroller approved the establishment by Mercantile of a trust office in a St. Louis suburb. A state bank brought suit for declaratory and injunctive relief, contending that the trust office had been established in violation of state law limiting bank branches. Mercantile argued, as does the Comptroller here, that because the trust office did not receive deposits, pay checks, or lend money, the McFadden Act did not apply. The Eighth Circuit rejected the argument, affirming the district court grant of injunctive relief, concluding "the three routine banking functions delineated in Section 36(f) are not the only indicia of branch banking." 548 F.2d at 719. Examining the services provided by the trust office, the court found that the office performed services routinely offered at the bank's main office and increased convenience for the bank's customers. Based on those facts, the court held that the trust office was a "branch" within Section 36(f). *Cf. Colorado v. First National Bank of Fort Collins*, 540 F.2d 497, 499-500 (10th Cir. 1976) ("accepting deposits, or paying checks, or lending money are not the only indicia of branch banking. The typical bank at the present time provides many other services"), *cert. denied*, 429 U.S. 1091, 97 S.Ct. 1102, 51 L.Ed.2d 537 (1977).

This court has held that the Glass-Steagall Act permits national banks to operate discount brokerage subsidiaries. The provision of brokerage services as described in the Security Pacific and Union Planters applications—at numerous locations in many states—is clearly aimed at attracting and servicing customers conveniently. The brokerage business, therefore, is within the category of "general business" which national banks may conduct at their main office and, as such, is subject to the branching restrictions in 12 U.S.C. § 81 and 12 U.S.C. § 36.

The Comptroller's final argument that the McFadden Act restrictions apply only to branches within the state where the bank has its central office must also be rejected. It ignores completely the fact that the McFadden Act was a limited extension of the national Banking Act provisions for the location of bank offices, which previously had allowed national banks only one central office. Never have national banks been authorized under the National Bank Act to maintain offices outside their home state.

In accordance with the foregoing, the court holds that an office of a national bank for the conduct of discount brokerage activities is a "branch" within the definition of Section 36(f) of the McFadden Act, subject to state law restrictions on the establishment of bank branch offices. The Comptroller's decision to the contrary, in approving the applications of Security Pacific and Union Planters for the establishment or purchase of a discount brokerage subsidiary without regard to the branching restrictions of the McFadden Act, shall therefore be reversed.

The parties shall submit proposed Judgments in accordance with this Opinion within ten days of the date of its filing.

APPENDIX C

COMPTROLLER OF THE CURRENCY
ADMINISTRATOR OF NATIONAL BANKS
Washington, D.C. 20219

DECISION OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION BY SECURITY PACIFIC NATIONAL BANK TO ESTABLISH AN OPERATING SUBSIDIARY TO BE KNOWN AS SECURITY PACIFIC DISCOUNT BROKERAGE SERVICES, INC.

DECISION

Background

Security Pacific National Bank (Security Pacific), Los Angeles, California, proposes to establish an operating subsidiary to be named Security Pacific Discount Brokerage Services, Inc. (Discount Brokerage). The subsidiary will engage, solely as agent on behalf of its customers, in the purchase and sale of all types of securities. It will also provide margin loans to customers and pay interest on credit balances in customer accounts in accordance with applicable requirements. These services will initially be offered to the public throughout the State of California at authorized branch offices. However, Discount Brokerage intends ultimately to offer these services at non-branch locations inside and outside California. It also intends ultimately to make these services available to the customers of other financial institutions that will act as introducing brokers. Certain incidental operations, such as maintaining record custody of customer's securities and clearing and settlement of transactions, may be performed at an office outside California.

Discount Brokerage will be a registered broker-dealer under the Securities Exchange Act of 1934, registering first with the Securities and Exchange Commission and later with the National Association of Securities Dealers.

It will also register with the California Department of Corporations and, to the extent required, other state securities commissions. Discount Brokerage may also seek membership on one or more national securities exchanges.

Applicability of the Glass-Steagall Act

A reading of the provisions of the Banking Act of 1933 commonly referred to as the Glass-Steagall Act—*i.e.*, Sections 16, 20, 21, and 32—and of the relevant legislative history and judicial decisions makes it clear that only certain specified securities activities are prohibited to banks. Specifically, Section 16 of the Act, codified in 12 U.S.C. § 24 (Seventh), states that national banks may not, with various exceptions not relevant here, "underwrite any issue of securities or stock." The Section, however, further delineates permissible and impermissible activities in stating that the "business of dealing in securities and stock by the [national banking] association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account." Thus, on its face, the Glass-Steagall Act permits those securities purchases and sales for customers in which the bank acts in the capacity of agent (*i.e.*, brokerage transactions), while generally prohibiting purchases and sales by banks acting as principal. This constitutes clear authorization for banks and, hence, their operating subsidiaries (*see* 12 C.F.R. § 7.7376) to engage in the activities contemplated for Discount Brokerage.

Certain early opinions of this Office imposed limitations upon the securities brokerage activities of national banks. As early as 1936, the Office expressed the opinion that national banks could purchase and sell securities only for existing customers of the bank and had to receive prior payment or have assets of the customer on hand to cover the transaction. Transactions were to be undertaken solely as an accommodation to the existing customers, and

compensation was limited to the fair cost of handling the transaction. 1 *Bull. of the Comptroller of the Currency*, No. 2, at 2-3 (Oct. 26, 1936). These views were codified in Paragraph 220 of the Comptroller's first *Digest of Opinions* in 1948, although the compensation provision was relaxed slightly. It was relaxed further in Paragraph 220A of the 1957 edition of the *Digest of Opinions*. In 1963, when the *Digest of Opinions* was superseded by the *Comptroller's Manual for National Banks*, all the provisions limiting the securities brokerage activities of national banks were deleted entirely.

The Office's early restrictive views are explained in a 1974 letter by Comptroller James E. Smith as reflecting "the great caution of banking regulations in the years immediately following the 1931-2 debacle." Letter to G. Duane Vieth (June 10, 1974). The letter went on to state that the early interpretations contained restrictions not imposed by the statute and accordingly were currently viewed to be erroneous. The letter enunciated this position in permitting national banks to offer Automatic Investment Service (AIS) programs to customers. Under AIS programs banks would provide lists of corporations to their customers and then periodically purchase for them shares of stock of the companies selected by the customers from the list, paying for the securities by debiting the customers' checking accounts. The brokerage services thus offered AIS customers are functionally equivalent to, albeit somewhat more narrow in scope than, the services Security Pacific proposes to offer to Discount Brokerage customers. As in the case of an AIS program, as discussed in detail in the 1974 letter, the services covered by this application are clearly authorized by the language of Section 16 of the Glass-Steagall Act and do not contravene the purposes of the Act, either by subjecting banks to material risks or by placing them in situations with unacceptable conflicts of interest deriving from the promotional pressures facing them. *See Investment Company Institute v. Camp*, 401 U.S. 617, 631-38 (1971).

The rejection of the restrictive position reflected in the Office's early opinions has found support in the courts. In *New York Stock Exchange, Inc. v. Smith*, 404 F. Supp. 1091 (D.D.C. 1975), *vacated on other grounds sub nom. New York Stock Exchange v. Bloom*, 562 F.2d 736 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 942 (1978), the court upheld the broader position adopted in the 1974 AIS letter. Specifically citing the argument made in the 1974 AIS letter that the early opinions "embodied an overcautious approach to bank regulation reflecting the atomsphere [sic] of the years immediately after the 1929 market crash rather than the legislative history of the act," the court went on to endorse AIS programs as falling within the statutory authorization of Section 16 of the Act and not presenting any of the risks discussed in the Act's legislative history or the judicial elaboration of it. *New York Stock Exchange, Inc. v. Smith, supra*, at 1097-1100.

Various statements by the Supreme Court in cases addressing Glass-Steagall Act issues suggest that the express language of the Act is the primary factor in any analysis and that securities brokerage activities by banks are not proscribed by the Act. In *Investment Company Institute v. Camp*, 401 U.S. 617 (1971), the Court analyzed a bank's participation in the organization, distribution, and marketing of shares of an investment company consisting of commingled managing agency account assets held by the bank as fiduciary. The Court found the bank's participation to clearly contravene the express language of Section 16 of the Act and to further subject the bank to the risks and conflicts Congress sought to obviate by the Act. Accordingly, the Court found the bank's program to be in violation of the Act. The Court was careful, however, to distinguish this prohibited activity from permissible activities, including purchases as agent for customers of securities. *Id.* at 623 n.10, 624-25.

The same type of statutory analysis was used by the Court in *Board of Governors of the Federal Reserve System v. Investment Company Institute*, 450 U.S. 46 (1981). That case upheld a ruling of the Federal Reserve Board (FRB) that serving as investment adviser to an open-end investment company and organizing and sponsoring, subject to certain limitations, a closed-end investment company were closely related to banking and could legally be undertaken by bank holding companies and their nonbank subsidiaries. The Court could find no prohibition of this conduct in the various provisions of the Glass-Steagall Act and accordingly rejected arguments based solely on broad statements of the policies embodied in the Act. The Court described the analysis employed in *Investment Company Institute v. Camp, supra*, as relying "squarely on the literal language of §§ 16 and 21 of the Glass-Steagall Act." 450 U.S. at 65. The Court went on to explain that the analysis of the risks presented in the earlier case was necessary only to respond to arguments on behalf of the bank that despite the literal prohibition on the conduct then at issue it was not the intent of Congress to prohibit it. 450 U.S. at 66. The Court also reiterated its earlier views that purchases of securities by banks acting as agent for their customers are specifically authorized by the Glass-Steagall Act. 450 U.S. at 55-56 n.18.

There is language in the legislative history of the Glass-Steagall Act to the effect that national banks were to be authorized by Section 16 to engage in securities brokerage transactions "to the same extent as heretofore." This language appears only to have meant generally that the ability of national banks to engage in brokerage transactions was to be subject to no additional constraints after the enactment of the Glass-Steagall Act beyond those applicable before its enactment. This analysis appears to have been adopted by the court in *New York Stock Exchange, Inc. v. Smith*, 404 F. Supp. 1091, 1098. Noting that there was considerable evidence that prior to 1933

banks did engage in brokerage transactions, the court concluded that even if the AIS programs under consideration were viewed as a more extensive involvement by banks in the brokerage business than existed prior to 1933, they nonetheless were not prohibited by the statutory language or the legislative history if they did not give rise to risks materially different from those normally associated with brokerage transactions. In view of the significant changes that have taken place since 1933 in the nature and delivery of brokerage services, this approach seems particularly appropriate.

The same argument concerning the "heretofore" language applies to the incidental activities that Security Pacific intends to perform through Discount Brokerage. That is, such functions as maintaining custody of securities for customers and clearing and settling their securities transactions, even in the absence of evidence that banks provided those services prior to 1933, do not exceed the statutory authorization in Section 16 of the Glass-Steagall Act so long as Discount Brokerage maintains its agency status in the transactions. Since these activities do not involve Discount Brokarage's taking any position in securities and do not create any promotional pressures by associating Discount Brokerage's name or financial prospects (or Security Pacific's) with that of any securities issuer, they do not appear to give rise to any of the risks the Act sought to address. It should also be noted that these types of activities are regularly performed by national banks, without any explicit statutory authorization beyond the incidental powers language of 12 U.S.C. § 24 (Seventh), in connection with the U.S. government and municipal securities dealer activities authorized in that Section.

The "heretofore" language in the legislative history could also be cited in connection with Security Pacific's intention to seek membership on national securities exchanges for Discount Brokerage. Because of certain rules of at

least the New York Stock Exchange (NYSE) prior to 1933, direct stock exchange membership by a national bank would have been impossible then. However, the large commercial banks clearly did have their representatives on the floor of the exchanges. *See, e.g.*, Sobel, *NYSE* 13-14 (1975). Further, various private bankers were members of the exchanges prior to the passage of the Glass-Steagall Act and at least one such company has maintained continuous NYSE membership since before the passage of the Act. In this regard, the NYSE proposed to adopt new Rule 310 in 1976 that would have prohibited a commercial bank not then a member of the NYSE from becoming such a member. The Glass-Steagall Act was cited by the NYSE as one reason for proposing the rule. In rejecting this rule, the Securities and Exchange Commission expressed skepticism about permitting existing bank members of the NYSE to retain their membership while prohibiting additional banks from joining, since Section 21 of the Glass-Steagall Act* (12 U.S.C. § 378) does not contain a grandfathering exception. The Commission concluded, quite properly, that the NYSE's position was subject to substantial doubt and, in any event, that resolution of the issue should be left to the federal banking agencies or the courts. *See* Securities Exchange Act Release No. 12737 (Aug. 25, 1976).

Whatever the pre-1933 history reveals with respect to exchange membership, however, should not be determinative of whether national banks may now be such members. The relevant concern is whether national banks as exchange members can conform their functional participation in securities transactions to the agency role permitted

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* Section 21 of the Glass-Steagall Act prohibits any person engaged in the issuing, underwriting, selling, or distributing of securities from also engaging in the business of receiving deposits. The Section expressly states, however, that activities authorized by Section 16 of the Glass-Steagall Act are not prohibited for depository institutions, including private bankers.

in Section 16 of the Glass-Steagall Act. Since acting solely in an agency capacity is possible, *see, e.g.*, NYSE Rule 91, and is the stated intention of Security Pacific for Discount Brokerage, exchange membership will not create any risks inconsistent with the brokerage role envisioned in the Act as permissible for national banks.

An additional Glass-Steagall Act issue arises when a bank chooses to conduct securities brokerage operations through an operating subsidiary. Section 20 of the Act, 12 U.S.C. § 377, prohibits affiliations between member banks, including all national banks, and companies "engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities." Early on, the Supreme Court interpreted the identical list of restricted functions in Section 32 of the Glass-Steagall Act, 12 U.S.C. § 78, not to include securities brokerage activities of a company. *Board of Governors of the Federal Reserve System v. Agnew*, 329 U.S. 441, 445-49 (1947). Such an interpretation seems appropriate and is, of course, entirely consistent with the view that Congress was trying to eliminate only certain risks, not including those associated with securities brokerage activities, from the commercial banking system.

Accordingly, the activities proposed by Security Pacific for Discount Brokerage are within the corporate powers of national banks and their operating subsidiaries and are not limited by the Glass-Steagall Act.

McFadden Act

Security Pacific's application indicates that it intends to offer Discount Brokerage's services through offices that are not bank branches or the bank's main headquarters, as well as through chartered offices. It is, of course, an element of our approval of the application that the geographic limitations effectively imposed by the National Bank Act's branching provisions, commonly referred to as

the McFadden Act, not be violated. 12 U.S.C. § 36. "Branch" is statutorily defined to include "any branch bank, branch office, branch agency, additional office or any branch place of business . . . at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(f). Security Pacific's legal memorandum, submitted as part of the application, expresses the opinion that the non-chartered offices at which Discount Brokerage will offer its services will not constitute branches under the McFadden Act because none of the statutory branching functions will be performed there.

Lending Money

Regarding the lending of money, the application states that Discount Brokerage will not make margin loans at non-branch offices. Such offices will be limited to the performance of tasks associated with loan origination within parameters analogous to those authorized by the Comptroller's Interpretive Ruling 7.7380 (12 C.F.R. § 7.7380). Interpretive Ruling 7.7380 authorizes the

> [o]rigination of loans by employees or agents of a national bank or of a subsidiary corporation at locations other than the main office or a branch office . . . [*p*]*rovided*, [t]hat the loans are approved and made at the main office or a branch office of the bank or at an office of the subsidiary located on the premises of, or contiguous to, the main office or branch office of the bank.

12 C.F.R. § 7.7380(b).

The Comptroller has identified certain loan solicitation and origination activities that clearly may be performed by loan production offices within the scope of the Interpretive Ruling. These include:

> 1) solicitation of loan business, including by means of advertisements disclosing the nature and limitations of the loan [loan production office];

2) providing information as to loan rates and terms;

3) interviewing and counseling applicants regarding loans (only), including the provision of disclosures required by regulations;

4) aiding customers in the completion of loan applications.

See, e.g., Letter from John G. Heimann, Comptroller of the Currency, to Exchange National Bank & Trust Company of Atchison, Atchison, Kansas (Jan. 31, 1979).**

Security Pacific's legal memorandum indicates that Discount Brokerage offices at non-branch locations will interview and counsel customers on loan rates and terms and aid customers in the completion of margin loan applications. Loan applications will then be transmitted to a chartered office at which they will be processed and at which any credit will be extended. The performance of these and other solicitation and origination activities, analogous to those outlined above, at non-branch Discount Brokerage offices in connection with the extension of margin credit at chartered offices would not, in our opinion, constitute lending money within the meaning of the McFadden Act.

Receiving Deposits

In addition to margin lending, Discount Brokerage will also maintain, and pay interest on, customer credit balances arising incidentally to its brokerage business, including (1) funds awaiting investment, (2) interest or dividends received on a customer's securities held in "street" name and (3) proceeds from securities sold by the broker awaiting reinvestment or other instructions

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** In *Independent Bankers Association of America v. Heimann*, 627 F.2d 486, 488 n.** (D.C. Cir. 1980) (*IBAA v. Heimann*), the court expressed general agreement with the non-branch status of loan production offices engaging in the limited array of functions set out in the letter.

from the customer. Security Pacific takes the position that these credit balances are not deposits and, therefore, that Discount Brokerage will not be receiving deposits within the meaning of the McFadden Act. .

Credit balances arising incidentally to brokerage activities may be distinguished, as correctly noted in Security Pacific's legal memorandum, on certain functional and legal grounds from bank deposits. Bank deposits are generally funds placed with a depository institution for the primary purpose of safekeeping, earning a return in the form of interest, or facilitating payments to third parties. They may be withdrawn at the discretion of the depositor under the terms and conditions of the account. The receipt of deposits is a principal function of banks, which publicly solicit deposits to provide funds to be used in the banks' lending business. Credit balances maintained by brokers, on the other hand, arise in connection with securities transactions of customers and, as such, are not directly solicited from the public. Indeed, the Securities Investor Protection Act, 15 U.S.C. § 78aaa *et seq.*, operates to restrict the advertising, promotional and selling practices of brokers regarding interest-bearing free credit balances. *See* Securities Exchange Act Release No. 18262 (Nov. 17, 1981). Further, there are specific regulatory restrictions regarding the use of credit balances by brokers. 17 C.F.R. § 240.15c3-2.

It should be noted, too, that securities firms regularly maintain and pay interest on customer credit balances, apparently in the belief that this practice does not violate the prohibition in Section 21 of the Glass-Steagall Act against the receipt of deposits by such firms. 12 U.S.C. § 378(a)(1). The prevalence of this practice argues against the characterization of customer credit balances as deposits generally.

Security Pacific also points to the non-deposit treatment of credit balances by the FRB in connection with balances

maintained by "agencies" under the International Banking Act of 1978, 12 U.S.C. § 3101 *et seq.*, and by investment companies chartered under Article XII of the New York Banking Law. The value of these examples, which have been drawn from the specialized context of international finance, is, however, clouded by the inclusion of "credit balances" within the definition of "deposits" in FRB Regulation D, 12 C.F.R. § 204.2(a)(1)(vi). Even assuming that credit balances are treated as deposits for the narrow monetary control purposes of Regulation D, however, it should be recognized that the meaning of deposit may be different in other regulatory or statutory contexts, such as under the McFadden Act. Based on all of the foregoing considerations, it is our opinion that credit balances arising in connection with securities brokerage transactions are not deposits within the meaning of the McFadden Act.

Non-enumerated Functions

It is further possible that Discount Brokerage offices could be found by a court to be branches within the meaning of the McFadden Act even in the absence of a finding that they receive deposits, pay checks or lend money. In *St. Louis County National Bank v. Mercantile Trust Company National Association*, 548 F.2d 716 (8th Cir.), *cert. denied*, 433 U.S. 909 (1977) (*St. Louis County*), a trust office operated by a national bank, which conducted a substantial amount of trust business at its main office, was held to be a branch, even though no deposits were received, checks paid or money lent at such office.

In the view of the Eighth Circuit, at least, the transaction with the public of certain business routinely carried on at the bank's main office constitutes branch banking activity for McFadden Act purposes. This Office finds the approach taken by the court in *St. Louis County* an overly broad reading of the statute, and we believe that the court's holding should at the very least be limited to

those dealings with the public requiring a specialized banking or similar license. In any event, finding that securities brokerage activity constitutes a branch banking function would appear particularly inappropriate in view of the number of banks currently operating U.S. government or municipal securities dealer offices that transact business with the public at non-branch locations on both an intra-state and interstate basis.

The application states the intention that an operations department, perhaps located outside California, will maintain record custody of securities held in accounts and be responsible for clearing and settlement of transactions, although initially a clearing broker may be employed to carry on some of these activities. A number of banks currently operate similar non-branch facilities to carry out these ministerial tasks relating to their municipal and government securities dealing and underwriting activities. Since the McFadden Act issue would be the same in the case of the Discount Brokerage operations department, the long-standing and widespread nature of the practice of bank municipal and government securities dealers is obviously relevant. It is, therefore, our opinion that ministerial functions not involving direct dealing with the public, such as the maintenance of record custody and the clearing and settlement of transactions, do not constitute branching functions either as enumerated in Section 36(f) or even under the expansive *St. Louis County* approach. *Cf. Independent Bankers Association of America v. Smith*, 534 F.2d 921, 936 (D.C. Cir. 1976) (no competitive advantage in dealing with public can arise from these ministerial services).

Location Where Services Are Provided

It is, of course, an element of our approval of the application that all essential branch banking functions performed in connection with Discount Brokerage's operations be performed at chartered offices. In our opinion,

the activities of Discount Brokerage, viewed individually or collectively (with the exception of the making of margin loans, treated separately above), should reasonably be found not to constitute branch banking for purposes of the McFadden Act.

FRB Regulations D and Q

It is also an element of approval of the application that Discount Brokerage and Security Pacific comply with FRB Regulation D, 12 C.F.R. Part 204, and FRB Regulation Q, 12 C.F.R. Part 217. Security Pacific states in its legal memorandum that Regulations D and Q are not applicable because credit balances arising in the course of a brokerage business are not deposits within the meaning of those regulations. As pointed out earlier, however, Regulation D seemingly defines "deposits" to include "credit balances," 12 C.F.R. § 204.2(a)(1)(vi). And even though Discount Brokerage would not appear to be a "depository institution," as defined in 12 C.F.R. § 204.2(m)(1)(i), its "obligations" may be treated as "obligations" of Security Pacific ("parent depository institution") under 12 C.F.R. § 204.3(a) ("Computation and maintenance").

This Office recommends that Security Pacific should accordingly consult the FRB concerning the applicability of Regulations D and Q to this matter.

Federal Deposit Insurance

It is a further element of approval of the application that Discount Brokerage comply with all applicable provisions of the Federal Deposit Insurance Act, 12 U.S.C. § 1811 *et seq.* Security Pacific states in the application that Discount Brokerage will apply for membership in Securities Investor Protection Corporation ("SIPC") so that customers' cash and securities held by Discount Brokerage will be protected by SIPC insurance coverage, and that cash held by Discount Brokerage will not be insured

by the Federal Deposit Insurance Corporation ("FDIC"). As in the matter of the applicability of FRB Regulations D and Q, this Office recommends that Security Pacific consult the FDIC in this regard.

Conclusion

This Office has carefully considered the legality of the activities proposed by Security Pacific for Discount Brokerage. For the reasons presented above, we believe these activities are legally permissible. Based on this legal analysis and our consideration of other relevant information presented by Security Pacific, the application is approved this day.

/s/ Doyle L. Arnold
DOYLE L. ARNOLD
Senior Deputy Comptroller
for Policy and Planning

Dated: 26 August 1982

APPENDIX D

September 20, 1982

Mr. Richard C. Raines
Senior Vice President
Union Planters National Bank of Memphis
67 Madison Avenue
Memphis, Tennessee 38103

Dear Mr. Raines:

The Office of the Comptroller of the Currency has approved the bank's application to acquire Brenner Steed & Associates, Inc., Memphis, Tennessee.

Please advise the Regional Administrator of National Banks in Memphis of the date on which the acquisition of the subsidiary is consummated and furnish its exact address, including street number, and the corporate name.

Very truly yours,

/s/
James E. Brennan
Manager, Bank Structure Analysis
Bank Organization and Structure

bcc: Case
Region 8
Chron:JFA
Chron:JEB
Chron:jj
reader
JFAlmand/jj/Septer er 20, 1982 0880C

APPENDIX E

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 84-5026, 84-5085

SECURITIES INDUSTRY ASSOCIATION

v.

COMPTROLLER OF THE CURRENCY, *et al.*,
Appellants.

SECURITIES INDUSTRY ASSOCIATION,
Appellant,

v.

C.T. CONOVER, Comptroller of the Currency,
Office of the Comptroller of the Currency.

July 12, 1985

On Suggestions for rehearing *En Banc* of the Comptroller of the Currency, filed May 28, 1985, and Intervenor, Security Pacific National Bank, filed June 12, 1985.

Before ROBINSON, Chief Judge, and WRIGHT, TAMM, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, Circuit Judges.

ORDER

PER CURIAM.

The suggestions for rehearing *en banc* of Security National Bank and the Comptroller of the Currency have been circulated to the full Court. A majority of the judges of the court in regular active service have not voted in favor thereof. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestions are denied.

Chief Judge SPOTTSWOOD W. ROBINSON, III, and Circuit Judge WALD did not participate in this order.

A dissenting statement of Circuit Judge SCALIA, joined by Circuit Judges BORK and STARR, is attached.

Prior Report: 577 F. Supp. 252 (D.C.D.C. 1983), *aff'd.* 758 F.2d 739 (D.C. Cir. 1985).

SCALIA, Circuit Judge, with whom Circuit Judges BORK and STARR join, dissenting:

The panel opinion, 758 F.2d 739, in this case upheld the judgment of the District Court, in a suit brought by an association of brokerage houses, that the Comptroller violated sections 7(c) and 8 of the McFadden Act, 12 U.S.C. §§ 36(c), 81 (1982), in permitting national banks to conduct discount brokerage operations at locations other than their main banking offices and authorized branches.

The McFadden Act restricts only the *location* and not (unlike the Glass-Steagall Act, ch. 89, 48 Stat. 162 (1933) (codified as amended in scattered sections of 12 U.S.C. (1982)) the *nature* of bank activities. It is uncontroverted that its purpose was to establish competitive equality between state and federal banks by authorizing branching by federally chartered banks to the same extent as permitted to state banks by state law. Thus, state banks (and state banking commissions) are obviously

within the zone of interests protected by the statute—but the brokerage houses suing in the present case are no more within it than are businesses competing for the parking spaces that an unlawful branch may occupy.

More importantly, however, the District Court, whose reasoning was adopted by the panel opinion, did not, in my view, base its standing decision merely on this erroneous construction of the language and purpose of the McFadden Act. My reading of the District Court opinion is that the Securities Industry Association's members (1) would have standing to sue under the Glass-Steagall Act, which restricts the scope of activities that national banks can engage in, and (2) would be actually harmed by attempts by national banks to exceed the locational curbs of the McFadden Act. This entirely reduces the "zone of interest" inquiry under the McFadden Act to an inquiry into "injury in fact," as the conclusion of the McFadden Act standing portion of the opinion demonstrates:

> To be sure, the McFadden Act restricts national banks not in the type of business they may conduct but where they may conduct it. Still, attempts to exceed those curbs would harm SIA's members just as the data processors in *Data Processing* [*Service Organizations v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970)] and the tour operators in *Arnold Tours* [*v. Camp*, 400 U.S. 45, 91 S.Ct. 158, 27 L.Ed.2d 179 (1970)]. Accordingly, SIA is arguably within the zone of interests sought to be protected by the Act.

Securities Industry Ass'n v. Comptroller of the Currency, 577 F. Supp. 252, 258-59 (D.D.C. 1983). But neither standing under the Glass-Steagall Act (a statute the functional equivalent of which was at issue in *Data Processing* and *Arnold Tours*) nor injury in fact—nor the two combined—suffice to satisfy the zone of interests test under the *McFadden Act*. Thus, the District Court opinion holds either that standing under one statute confers

standing to raise challenges under a separate statute—which is inconsistent with *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 140-41 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978), and indeed with the whole principle behind the zone test—or that injury in fact is sufficient to confer standing—which discards the zone test entirely.

On the merits, too, the District Court's—and thus the majority's—conclusion that discount brokerage offices operated by national banks are branches seems mistaken. The McFadden Act defines a branch to "include" any place "at which deposits are received, or checks paid, or money lent," 12 U.S.C. § 36(f) (1982), which plainly does not describe a discount brokerage office. The District Court found, however, that the statutory definition of branches is not limited to offices performing one or more of these enumerated functions, basing this conclusion on remarks by Rep. McFadden made after passage of the Act, an opinion of the Eighth Circuit (followed nowhere else) finding trust offices to be branches, *St. Louis County National Bank v. Mercantile Trust Company National Ass'n*, 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909, 97 S.Ct. 2975, 53 L.Ed.2d 1093 (1977), and dicta in *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969). It seems to me, however, that the *Plant City* dicta are virtually dispositive *in favor of the Comptroller*. The Court said:

> Although the definition may not be a model of precision in part due to its circular aspect, it defines the minimum content of the term "branch" by use of the word "include." *The definition suggests a calculated indefiniteness with respect to the outer limits of the term.* However, the term "branch banks" at the very least includes any place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more.

396 U.S. at 135, 90 S.Ct. at 344 (emphasis added). It seems to me that a statute containing a "calculated indefiniteness" presents precisely the situation in which our deference to the agency should be at its height. *See Chevron, USA, Inc. v. NRDC, Inc.*, —— U.S. ——, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). The Comptroller's conclusion that discount brokerage houses do not fall within the range of indefiniteness—or indeed that the range includes *only* the enumerated functions—cannot by any means be considered unreasonable, even if we think it mistaken.

This circuit plays a leading role in formulating banking law, and administrative law generally, and this case squarely presents important questions in both areas. I think it should have been heard by the full court.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-2865

SECURITIES INDUSTRY ASSOCIATION,
Plaintiff,

v.

COMPTROLLER OF THE CURRENCY, *et al.*,
Defendants.

[Filed Dec. 16, 1983]

AMENDED FINAL JUDGMENT

This matter came before the court on cross-motions for summary judgment by the plaintiff and defendants, and upon consideration thereof, it is, hereby

ORDERED, ADJUDGED and DECREED that the decisions of the Comptroller of the Currency dated August 26, 1982 and September 20, 1982 approving applications of Security Pacific National Bank and Union Planters National Bank to provide discount brokerage services, do not violate the Glass-Steagall Act (12 U.S.C. § 24 *Seventh*, 377), in that said Act does not prohibit national banks or their subsidiaries from engaging in the brokerage business; and it is further

ORDERED, ADJUDGED and DECREED that insofar as defendants have authorized banks directly or indirectly to form, acquire, and/or conduct discount securities bro-

kerage operations at locations outside the states in which the main office of each of the banks is located and/or within such states at unchartered locations or otherwise at locations not permitted by 12 U.S.C. §§ 36, 81, the authorizations are null and void as being contrary to law and in excess of defendants' authority; and it is further

ORDERED, ADJUDGED and DECREED that the said decisions insofar as said decisions do not take into account the branching restrictions of the McFadden Act, 12 U.S.C. §§ 36, 81, violate the provisions of said Act and shall be reversed; and it is further

ORDERED, ADJUDGED and DECREED that defendants are directed to withdraw and set aside the foregoing approvals insofar as they are in violation of the branching restrictions of the aforesaid McFadden Act as set forth in the court's Memorandum Opinion filed herein on November 2, 1983; and it is further

ORDERED, ADJUDGED and DECREED that the parties shall bear their own costs in this matter.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Art. III, § 2, para. 1:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Selected Provisions of the McFadden Act, 44 Stat. 1224 (1927), as amended

12 U.S.C. § 36(c) (1982):

> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State

on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: *Provided*, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

12 U.S.C. § 36(f) (1982):

The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.